

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOHN GARRETT SMITH,

Plaintiff,

v.

WASHINGTON STATE  
DEPARTMENT OF CORRECTIONS  
et al,

Defendants.

CASE NO. 3:21-cv-05271-TSZ-JRC

REPORT AND RECOMMENDATION

NOTED FOR: May 21, 2021

The District Court has referred this action, filed pursuant to 42 U.S.C. § 1983, to Chief United States Magistrate Judge J. Richard Creatura. Before the Court is plaintiff John Garrett Smith's declaration and application to proceed *in forma pauperis* ("motion"). Dkt. 4. After reviewing the motion, the Court concludes that plaintiff has incurred three "strikes" under 28 U.S.C. § 1915(g) and has failed to show he is under imminent danger of serious physical injury. Therefore, the Court recommends that plaintiff's motion (Dkt. 4) be denied and plaintiff be directed to pay the \$402.00 filing fee in order to proceed with this action.

## 1 I. Background

2 Plaintiff, who is a Washington State prisoner currently incarcerated at the Stafford Creek  
 3 Corrections Center (“SCCC”), filed the motion in this civil rights action on April 14, 2021. Dkt.  
 4 1, 4. In the proposed complaint, plaintiff alleges that in 2020, defendants interfered with  
 5 plaintiff’s e-mails at SCCC. Dkt. 1-1 at 2. Plaintiff contends that the e-mails contained a  
 6 “manifesto” of his “life work – an array of patent protected technologies in pure energy, food, air  
 7 and water, wrapped in dialogue by characters in the novel regarding their application to fix  
 8 serious world problems.” *Id.* at 2.

## 9 II. Discussion

10 The Prison Litigation Reform Act (“PLRA”), 28 U.S.C. § 1915, governs *in forma*  
 11 *pauperis* (“IFP”) proceedings. Under § 1915(a), a district court may waive the filing fee for civil  
 12 complaints by granting IFP status to individuals unable to afford the fee. *Andrews v. Cervantes*,  
 13 493 F.3d 1047, 1051 (9th Cir. 2007). “To address concerns that prisoners proceeding IFP were  
 14 burdening the federal courts with frivolous lawsuits, the PLRA altered the IFP provisions for  
 15 prisoners in an effort to discourage such suits.” *Id.* (citing *Abdul-Akbar v. McKelvie*, 239 F.3d  
 16 307, 312 (3rd Cir. 2001) (en banc)). Indigent prisoners still receive IFP status if they meet the  
 17 requirements, but § 1915(b) states prisoners proceeding IFP must pay the filing fee when funds  
 18 become available in their prison accounts. 28 U.S.C. §1915(b); *Cervantes*, 493 F.3d at 1051.  
 19 “Additionally, prisoners who have repeatedly brought unsuccessful suits may entirely be barred  
 20 from IFP status under the three-strikes rule.” *Cervantes*, 493 F.3d at 1051-52. The “three-strikes  
 21 rule,” contained in §1915(g), states:

22 [i]n no event shall a prisoner bring a civil action under this section if the prisoner  
 23 has, on 3 or more prior occasions, while incarcerated or detained in any facility,  
 24 brought an action or appeal in a court of the United States that was dismissed on  
 the grounds that it is frivolous, malicious, or fails to state a claim upon which relief

1 may be granted, unless the prisoner is under imminent danger of serious physical  
2 injury.

3 The Court notes that the PLRA's strike provision does not distinguish between dismissals  
4 with prejudice, dismissals without prejudice, actions dismissed on the merits, or actions  
5 dismissed pursuant to the PLRA's screening provisions. *O'Neal v. Price*, 531 F.3d 1146, 1154-  
6 55 (9th Cir. 2008). When an application is rejected pursuant to the screening provisions of 28  
7 U.S.C. § 1915 and the case is dismissed, the dismissal counts as a strike. *Id* at 1155.

8 While incarcerated plaintiff brought at least three actions which were frivolous,  
9 malicious, or failed to state a claim. *See Smith v. Settle*, Case No. 3:18-cv-5221-RJB (W.D.  
10 Wash. March 30, 2018) (dismissed as frivolous and for failure to state a claim); *Smith v.*  
11 *Aldridge*, Case No. 3:18-cv-5191-RBL (W.D. Wash. May 22, 2018) (dismissed as frivolous and  
12 deemed a strike); *Smith v. Walker*, Case No. 3:18-cv-5211-BHS (W.D. Wash. May 31, 2018  
13 (dismissed with prejudice and deemed frivolous under §1915); *Smith v. Browne*, Case No. 3:18-  
14 cv-5166-RBL (W.D. Wash. July 30, 2018) (dismissed case as a strike because the case was  
15 frivolous and/or malicious); *see also Washington v. Los Angeles County Sheriff's Dep't*, 833  
16 F.3d 1048, 1055-56 (9th Cir. 2016) (While not all claims dismissed under *Heck* "categorically  
17 count" as failures to state a claim or as frivolous or malicious claims, such dismissals may count  
18 as strikes if "the pleadings present an 'obvious bar to securing relief' under *Heck*."). Therefore,  
19 plaintiff has incurred three strikes and is barred from proceeding IFP in this action unless he can  
20 show he is exempt from the three-strikes rule because he is under imminent danger of serious  
21 physical injury. The Court finds that plaintiff has also filed several other lawsuits while  
22 incarcerated. As the Court found that plaintiff has incurred at least four strikes, the Court  
23 declines to review all lawsuits filed by plaintiff while he was incarcerated to determine if he has  
24 incurred more strikes.

1 The three-strikes rule does not apply if “the prisoner is under imminent danger of serious  
2 physical injury.” 28 U.S.C. § 1915(g). Prisoners qualify for the imminent danger exception based  
3 on the alleged conditions at the time the complaint is filed. *Cervantes*, 493 F.3d at 1052. The  
4 imminent danger exception requires a prisoner allege a danger which is “ready to take place” or  
5 “hanging threateningly over one’s head.” *Id.* at 1056 (internal citations omitted). The Ninth  
6 Circuit has held “requiring a prisoner to ‘allege ongoing danger . . . is the most sensible way to  
7 interpret the imminency requirement.’” *Id.* (quoting *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th  
8 Cir. 1998)). Additionally, the plaintiff must make specific or credible allegations showing the  
9 threat is real and proximate. *Cervantes*, 493 F.3d at 1053 (citing *Lewis v. Sullivan*, 279 F.3d 526,  
10 531 (7th Cir. 2002); *Kinnell v. Graves*, 265 F.3d 1125, 1128 (10th Cir. 2001)).

11 Plaintiff alleges that defendants interfered with his e-mails. *See* Dkt. 1-1. Based on the  
12 allegations in the complaint is it unclear if plaintiff has stated a claim for which relief can be  
13 granted. It is, however, clear that plaintiff does not allege danger of any physical injury, much  
14 less an imminent serious physical danger which is “ready to take place” or “hanging  
15 threateningly over [his] head.” *Cervantes*, 493 F.3d at 1056. Therefore, the imminent danger  
16 exception does not apply in this case, and plaintiff is subject to the three-strikes rule.

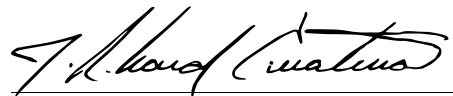
### 17 **III. Conclusion**

18 For the above stated reasons, the Court finds that plaintiff has incurred at least three  
19 strikes under 42 U.S.C. § 1915(g) and has not shown the imminent danger exception applies.  
20 Therefore, the Court recommends that plaintiff’s motion (Dkt. 4) be denied. The Court further  
21 recommends that plaintiff be ordered to pay the \$402.00 filing fee within thirty (30) days of the  
22 date on which this report and recommendation is adopted if he wishes to proceed with this  
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1 lawsuit. If plaintiff does not pay the filing fee, the Court recommends that this case be dismissed  
2 without prejudice.

3 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
4 Procedure, the parties shall have fourteen (14) days from service of this Report to file written  
5 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
6 objections for purposes of appeal. *Thomas v Arn*, 474 U.S. 140 (1985). Accommodating the time  
7 limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on May 21,  
8 2021, as noted in the caption.

9 Dated this 4th day of May, 2021.

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12 J. Richard Creatura  
13 Chief United States Magistrate Judge  
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